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No. 06-123

Supreme Court, U.S.
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In The Supreme Court of the United States

WELTMAN, WEINBERG & REIS CO., L.P.A.,
Petitioner,

v.

ROBERT TODD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF OHIO CREDITOR'S ATTORNEYS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Yale R. Levy
Pope & Levy Co., LPA
903 Eastwind Drive
Westerville, Ohio 43081
(614) 898-5200

Counsel of Record for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

JURISDICTION 3

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT ERRED IN BOTH ITS INTERPRETATION AND ITS APPLICATION OF THE ABSOLUTE WITNESS IMMUNITY RULE, WHICH WILL HAVE A DETRIMENTAL CHILLING EFFECT ON HOW ATTORNEYS REPRESENT THEIR CLIENTS' INTERESTS 3

II. THE SIXTH CIRCUIT ERRED IN ITS INTERPRETATION OF *EXXON MOBIL CORP. V. SAUDI BASIC INDUSTRIES CORP.*, AND ERRED IN DISREGARDING THE *ROOKER-FELDMAN* DOCTRINE AND IN ENCOURAGING AN UNPRECEDENTED EXPANSION OF FEDERAL SUBJECT-MATTER JURISDICTION 8

CONCLUSION 14

TABLE OF AUTHORITIES

Cases **Page**

Agg v. Flannagan, 855 F.2d 336 (6th Cir. 1988) 10

Briscoe v. LaHue, 460 U.S. 325 (1983) 3

Burns v. County of King, 883 F.2d 819 (9th Cir. 1989) 4

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 1

Exxon Mobil Corp. v. Saudi Basic Industries Corp., 544 U.S. 280 (2005) 8

Federal Housing Administration, Region No. 4 v. Burr, 309 U.S. 242 (1940) 4

Giffin v. Summerlin, 78 F.3d 1227 (7th Cir. 1996) 4

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 1, 9

Sykes v. James, 13 F.3d 515 (2d Cir. 1993) 4

Constitution and Statutes

15 U.S.C. §§ 1692 et seq. 2

15 U.S.C. § 1692n 11

28 U.S.C. § 1254 3

28 U.S.C. § 2101 3

TABLE OF AUTHORITIES (CONT'D)

Statutes **Page**

Fed. R. Civ. P. 11 7

Ohio Rev. Code Ann. § 2716.11 4

Sup. Ct. R. 37 3

Sup. Ct. R. 37.2 1

Sup. Ct. R. 37.6 1

Other

Lewis D. Lowenfels et al., *Attorneys as Gatekeepers: SEC Actions Against Lawyers in the Age of Sarbanes-Oxley*, 37 U. Tol. L. Rev. 877 (Summer 2006) 13

Report of the American Bar Association Task Force on the Attorney-Client Privilege, SL 096 ALI-ABA 101 (Aug. 2005) 13

INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, Ohio Creditor's Attorneys Association, respectfully submits this brief in support of Petitioner, Weltman, Weinberg & Reis Co., LPA. *Amicus Curiae* files this brief pursuant to Sup. Ct. R. 37.2(a) and has received written consent from both Petitioner and Respondent.

Amicus Curiae encourages the granting of the writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit because the judgment results from an incorrect interpretation and application of the absolute witness immunity rule and the long-standing *Rooker-Feldman* doctrine established by this Court.[1] The Sixth Circuit's judgment is inconsistent with this Court's precedent and with that of other federal circuit courts.[2]

The Ohio Creditor's Attorneys Association is an association of attorneys who practice primarily in the State of Ohio, but who are interested in the proper application of the law and the impact of judicial decisions on all practicing attorneys, particularly in the retail, consumer, and commercial litigation areas. The Ohio Creditor's Attorneys Association's mission is to educate its members and others on the laws, particularly those federal and state laws, impacting on the

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[1]The *Rooker-Feldman* doctrine takes its name from two Supreme Court cases: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[2]Pursuant to Sup. Ct. R. 37.6, *amicus* represents that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* has made a monetary contribution to the preparation and submission of this brief.

practices of creditors' rights, and to actively encourage responsible and appropriate legislation impacting on the retail collection area, including the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 et seq. (FDCPA), as well as on the commercial collection area. *Amicus Curiae* believes that, consistent with the Court's precedent, attorneys should be immune from actions for damages for words spoken or written in the course of a judicial proceeding, including postjudgment garnishment proceedings. In contrast, the Sixth Circuit's decision ignores the Court's rule on absolute witness immunity. The Sixth Circuit's decision will specifically expose creditors' attorneys participating on behalf of their clients in postjudgment proceedings to lawsuits, damages, and litigation expenses, and the eroding of the absolute witness immunity rule will likely migrate to other practices of the law and detrimentally impact on the representation of a broad range of clients by attorneys.

Amicus Curiae further specifically believes that the *Rooker-Feldman* doctrine established by this Court must be applied to preclude federal jurisdiction over FDCPA claims inextricably intertwined with a state court decision. In contrast, the Sixth Circuit's decision interprets recent Supreme Court decisions as effectively eliminating the *Rooker-Feldman* doctrine, thus concluding that the federal district court had subject-matter jurisdiction over plaintiff's claim in federal court that he was barred from bringing in state court. The Sixth Circuit's misinterpretation of the *Rooker-Feldman* doctrine, if not reviewed, will lead to an abuse of the federal judicial system, including a significant increase in the number of federal lawsuits brought against creditors' attorneys. Under the Sixth Circuit's decision, any disgruntled state court debtor can use the FDCPA to allege claims arising from issues identical to those in state court in an attempt to get around unsatisfactory state court judgments. Furthermore, the erosion of the *Rooker-Feldman* doctrine will cause a notable

increase in federal court filings generally, as well as confusion over the basic structure of the state and federal court system.

This case offers the Court the significant and timely opportunity to affirm its own precedent establishing the absolute witness immunity rule and the *Rooker-Feldman* doctrine. The Court's review should preclude the Sixth Circuit Court of Appeals from interpreting these two judicial principles in ways that are contrary to long-established and reliable standards and practices.

JURISDICTION

On January 13, 2006, the order of the Sixth Circuit Court of Appeals sought to be reviewed was entered. The court of appeals denied the Petitioner's petition for rehearing and for rehearing en banc on April 24, 2006. The Petition for Writ of Certiorari is timely pursuant to 28 U.S.C. § 2101, and this *Amicus Curiae* in support of the Petition is filed pursuant to Sup. Ct. R. 37. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT ERRED IN BOTH ITS INTERPRETATION AND ITS APPLICATION OF THE ABSOLUTE WITNESS IMMUNITY RULE, WHICH WILL HAVE A DETRIMENTAL CHILLING EFFECT ON HOW ATTORNEYS REPRESENT THEIR CLIENTS' INTERESTS.

The absolute witness immunity rule, and how it is to be applied in the context of a federal statute, was defined and applied by this Court in *Briscoe v. LaHue*, 460 U.S. 325 (1983). This important safeguarding rule has not been overruled and continues to be actively applied and relied upon by judges and

litigants in both state and federal courts. In order for the rule to apply, a court must first determine whether the immunity was established when the particular statute was enacted. Second, the court must decide whether in enacting the statute, the legislature intended to repeal the immunity. To claim immunity, the witness must also demonstrate that he or she was serving a function within the judicial process.

It is well established that postjudgment garnishment and attachment proceedings are part of the judicial process and that an attorney submitting a garnishment affidavit serves an important and legitimate judicial function. *Federal Housing Administration, Region No. 4 v. Burr*, 309 U.S. 242, 246 (1940). It is also well established that courts apply the witness immunity rule to statements made in aid of garnishment and that the rule applies in ex parte proceedings. *See Burns v. County of King*, 883 F.2d 819, 822 (9th Cir. 1989); *Sykes v. James*, 13 F.3d 515 (2d Cir. 1993). Within the postjudgment garnishment context and numerous other contexts, the absolute witness immunity rule is intended to ensure that the judicial system functions unimpeded by fear on the part of witnesses that they will be sued for damages for their role in the judicial process. *Giffin v. Summerlin*, 78 F.3d 1227 (7th Cir. 1996).

The absolute witness immunity rule applies to the factual circumstances in this case. Under Ohio law, to commence a postjudgment garnishment proceeding, the creditor or the attorney for the creditor, which in the instant case was Petitioner Weltman, Weinberg & Reis Co., must file an affidavit stating that "the affiant has a reasonable basis to believe that the person named in the affidavit as the garnishee may have property, other than personal earnings, of the judgment debtor that is not exempt under the law of this state or the United States." Ohio Rev. Code Ann. § 2716.11. In this case, the state court determined that the affidavit was valid and enforceable. Accordingly, the court ordered that the

judgment debtor's bank account be garnished. Later, however, after a hearing on the debtor's motion regarding the status of the garnished funds, the state court determined that the funds were exempt. Neither party appealed the state court's judgment. Instead, in violation of both the absolute witness immunity rule and the *Rooker-Feldman* doctrine, the debtor filed a federal court proceeding seeking damages against the attorney, alleging violations of the FDCPA.

Amici Curiae attorneys who are practicing in the area of creditors' rights reasonably rely on the absolute witness immunity rule, which is frequently applied and is well established after *Briscoe*. The Sixth Circuit's refusal to apply the rule to the instant case will expose all creditors' attorneys to potential lawsuits by disgruntled opponents, which is precisely what the rule was intended to eliminate. Importantly, the Sixth Circuit recognized in its Opinion that the FDCPA did not abrogate the absolute witness immunity rule. Further, the Sixth Circuit agreed that the rule is applicable to testimony presented in affidavit form and that "the form of the witness testimony should not affect the status of the immunity attached thereto." The Sixth Circuit also acknowledged that garnishment proceedings under Ohio law are essentially equipped with probable cause, because such proceedings are brought only *after* a valid judgment has been entered. Yet, in derogation of the basic elements of the absolute witness immunity rule established by the Court, and acknowledging evidence of the elements in the case before it, the Sixth Circuit concluded that in a postjudgment garnishment proceeding, the affiant is a "complaining witness" without immunity. Consequently, it is unclear under the Sixth Circuit's Opinion why the absolute witness immunity rule did not apply where the affidavit testimony was presented in a postjudgment proceeding where probable cause issues were not required, and whether the absolute witness immunity rule *can ever be applied* after the Sixth Circuit's decision.

The Sixth Circuit's decision places the absolute witness immunity rule in serious limbo not only for creditors' attorneys, but for all attorneys who are required to testify in a case. The court's unsubstantiated conclusion that attorneys submitting affidavits required by state statute in postjudgment garnishment proceedings may be exposed to damages claims by opponent debtors will undermine the creditors' attorneys' ability to zealously represent their clients. The ruling specifically exposes creditors' attorneys to unprecedented claims by debtors who are dissatisfied with the outcome of having to pay their debts and by those who will file lawsuits to bring settlement pressure on the underlying debt because it is more expensive to fight the federal action. Other debtors will file lawsuits simply to seek damages from witnesses to cover their debts and fees.

The Sixth Circuit decision will therefore have a chilling effect on creditors' attorneys and ultimately on all attorneys who can no longer reasonably rely on the appropriate judicial protections afforded up until now by the absolute witness immunity rule. What attorney will not now be reluctant to proceed with a postjudgment collection proceeding entailing affidavit testimony prior to commencing a garnishment or attachment proceeding for fear of reprisal by the opposing party in the form of a lawsuit for damages?

The Sixth Circuit's callous dismissal of the chilling effect of its decision is equally disturbing and suggests a more widespread derogation of the absolute witness immunity rule when applied to any attorney, not just creditors' attorneys, in other contexts. The most significant chilling effect will be on the lack of representation available to creditors who seek assistance in recovering on defaulted loans. Just as medical doctors in certain disciplines with high malpractice insurance premiums walk away from the practice, leaving patients with little choice of care, attorneys will be reluctant to practice in areas where witness testimony is likely, for fear of reprisal and

potentially exorbitant additional costs if the absolute witness immunity rule does not apply *or if* there is uncertainty about the application of the absolute witness immunity rule.

Remarkably, the Sixth Circuit assumes that garnishment actions are a profitable business and that any ramifications from a lack of immunity and any additional protections taken by attorneys potentially exposed to unwarranted lawsuits will simply be passed on to the creditor client. To the contrary, pass-through costs of expensive litigation and harassment suits are severely limited in the marketplace. The Sixth Circuit also fails to recognize the detrimental cost lawsuits against attorneys have on an attorney's reputation and goodwill in a community.

The Sixth Circuit's opinion also fails to adequately respond to the fact that the abolition of the absolute witness immunity rule will simply have no beneficial result. That is, the prejudice to creditors' attorneys due to the abolition of the absolute witness immunity rule far outweighs any conceivable benefit the abolition may have. Attorney practice has been successfully regulated through each state bar system and professional rules and disciplinary actions. If a particular party or the court is concerned about aberrant behavior by an attorney, both state courts and federal courts have procedures, such as Fed. R. Civ. P. 11 or the equivalent state sanction rule, for reprimand and sanctions. Clients concerned about their attorneys' decisions or actions may bring common-law malpractice actions or seek redress through the state bar association. Both state and federal judges have discretionary authority to address unprofessional or tortious behavior by attorneys. The Sixth Circuit decision to, at a minimum, carve out an exception to the absolute witness immunity rule and not apply the rule to creditors' attorneys submitting postjudgment garnishment affidavits is not only inconsistent with decisions by this Court and other federal circuits, but it

serves no practical purpose other than to discourage attorneys from practicing in the area of creditors' rights.

Finally, the Sixth Circuit's negative attitude toward creditors' attorneys has no justifiable explanation in the case. It is uncontroverted that the Petitioner fully complied with state law in pursuing its client's rightful claim to have its debts paid. Any improper conduct on the part of the creditors' attorney should have been addressed in state court through the numerous venues available for such complaints. No such action was taken by the debtor, who was only interested in damages relief. Allowing a party to ignore redress in state court and, instead, to seek damages in federal court, where the witness/attorney violated no laws, is a dangerous precedent to allow.

II. THE SIXTH CIRCUIT ERRED IN ITS INTERPRETATION OF *EXXON MOBIL CORP. V. SAUDI BASIC INDUSTRIES CORP.*, AND ERRED IN DISREGARDING THE *ROOKER-FELDMAN* DOCTRINE AND IN ENCOURAGING AN UNPRECEDENTED EXPANSION OF FEDERAL SUBJECT-MATTER JURISDICTION.

The Sixth Circuit's dismissal of the application of the *Rooker-Feldman* doctrine to the factual and legal circumstances of this case is equally as incomprehensible as it is disturbing. Under the *Rooker-Feldman* doctrine, as redefined by *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 293 (2005), a plaintiff may not initiate a federal claim in lieu of pursuing appropriate remedies, claims, or an appeal in state court when the federal claim is "inextricably intertwined" with the final state court judgment. While the federal circuit courts continue to be severely divided on how the *Rooker-Feldman* doctrine should be applied, the Sixth Circuit's decision in this

case does not just narrow *Rooker-Feldman* and expand the reach of federal subject-matter jurisdiction, the decision effectively overrules *Rooker-Feldman*. As such, unless overruled, under the Sixth Circuit decision, dissatisfied state court litigates can simply refile their claim in federal court under the guise of a federal statute and bypass the state court.

It is of grave concern to *Amicus Curiae* that the Sixth Circuit ignored the *Rooker-Feldman* doctrine and allowed the FDCPA to be used as the basis of a federal court claim. The remedy sought in federal court is identical to the remedy sought in the state court action, and the injury alleged in the federal action arises from a state court order. The Ohio state court, pursuant to Ohio statutory law, ordered that the defendant's garnishment affidavit was proper, notwithstanding the fact that the affidavit did not specify that a formal debtor exam had taken place. The seizure of funds thus occurred as a result of the state court garnishment order. Rather than pursuing remedies in state court, the plaintiff subsequently sought relief in federal court, using the FDCPA as a vehicle to file a federal claim, and asked the federal court to essentially declare that the state court order was improper and to award plaintiff damages. Even taking into account the recent limitations to the *Rooker-Feldman* doctrine, the fundamental precepts of the doctrine remain, and the plaintiff "cannot be permitted to do indirectly what he no longer can do directly." *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Further, a plaintiff cannot bring a federal claim in lieu of a state court appeal that is inextricably intertwined with the state court judgment. Yet, the Sixth Circuit erroneously concluded that the federal court had subject-matter jurisdiction.

If the Sixth Circuit's abolition of the *Rooker-Feldman* doctrine remains enforceable, there will be no viable safeguards throughout the Sixth Circuit states to guard against the federal court essentially overruling valid state court

judgments and state law. In the instant case, for example, the Ohio court approved the garnishment affidavit because, in its opinion, the affidavit complied with Ohio statutory law. The Ohio court entered a garnishment order. The federal court's decision, allowing the plaintiff to seek damages against the affiant arising from the state court garnishment order, permits, without restriction, the federal court to impose additional requirements on Ohio statutory law and to preempt state court law.

The result of the federal court's intervention permits the federal courts seemingly unlimited jurisdiction to interpret the function of the Ohio garnishment affidavit under the terms and policies of the FDCPA, notwithstanding the state court's determination that this function is solely within the discretion of the state courts. The FDCPA is not the proper vehicle to redress what is essentially the plaintiff's constitutional challenge to the Ohio statute. If the federal FDCPA action is permitted to proceed, the result will be to permit the court to impose probable cause standards on the postjudgment affidavit required for garnishment proceedings. The Ohio statute does not require probable cause, because the affidavit is prepared *after* the judgment on the debt. An attorney filing a garnishment affidavit is recovering on a judicially determined debt. If the Ohio state legislature is concerned about the role of probable cause in postjudgment affidavits, the state legislature can address and deliberate any modifications to the state laws in the proper forum. It is well established, however, that for constitutional purposes, the taking of a debtor's property is accomplished by the underlying judgment, which the defendant successfully obtained in the instant case. *See Agg v. Flannagan*, 855 F.2d 336, 343 (6th Cir. 1988).

Furthermore, Congress was unequivocal that the FDCPA was not intended to interfere with state laws. Indeed, the federal statute specifically states that it "does not annul,

alter, or affect, or exempt any person subject to the provision of this title [15 U.S.C. §§ 1692 et seq.] from complying with the laws of any state with respect to debt collection practices." 15 U.S.C. § 1692n. The idea that a dissatisfied state court plaintiff can refile his or her claim in federal court under the FDCPA to effectively override a state court procedure pursuant to state law contradicts the fundamental policies of the federal statute.

Under our federalist system of government, the federal courts do not and should not have jurisdiction to modify state statutes. Yet, if the Sixth Circuit's interpretation of federal subject-matter jurisdiction is not reversed, the line between state and federal jurisdiction is severely blurred or, at the very least, confusing and unreliable. Under either interpretation, it is reasonably foreseeable that dissatisfied state court litigants will take advantage of the confusion and seek federal court intervention and remedies where they did not exist before. By interpreting and ruling on state laws through the screen of separate federal statutes, federal courts will continue to redefine and supersede state laws, and litigants will happily end run around unsatisfactory state statutes and state judges' rulings.

By overruling the *Rooker-Feldman* doctrine, the Sixth Circuit's decision is particularly alarming to creditors' attorneys, including the membership of the Ohio Creditor's Attorneys Association. By permitting plaintiffs to use the FDCPA in federal court actions, no matter how intertwined the claims are with the underlying state court action, so as to impose additional requirements and meaning on state procedures for collecting on judgments, creditors' attorneys will no longer have any guidance or structure in this area of the law. Attorneys can no longer reasonably rely on state law procedures for basic collection matters if they are constantly concerned that their actions will be analyzed under a different set of federal statutes which have their own policy considerations. Furthermore, creditors' attorneys cannot

reasonably rely on the legislative system in place for amending state legislation if the federal courts, rather than the state legislature, are involved in modifying state law requirements.

As with the Sixth Circuit's abolishment of the absolute witness immunity rule, the Sixth Circuit's overruling of the *Rooker-Feldman* doctrine will result in confusion, uncertainty, and substantial exposure to litigation for attorneys. The chilling effect will mean, contrary to the Sixth Circuit's seemingly indifferent attitude, that not only creditors' attorneys, but attorneys in other disciplines as well, will be reluctant to take on or zealously represent clients in creditors' rights cases or in other cases potentially involving federal claims under any broad federal consumer protection or commercial statute.

This case offers the Court the opportunity to reestablish the absolute witness immunity rule and to articulate for future challenges the scope of the rule and, if there are exceptions to the rule, what those exceptions are and why. Additionally, the case offers the Court an opportunity to further define the boundaries of the *Rooker-Feldman* doctrine and federal subject-matter jurisdiction. If the Sixth Circuit decision is not addressed, confusion over the role of the federal courts, particularly in how subject-matter jurisdiction can be manipulated to modify and change state law, will persist and lead to additional costly and unproductive litigation.

If there is legitimate concern about the practices of creditors' attorneys, which has not been demonstrated in this litigation despite extensive briefing and argument, the state or federal legislature, not the federal courts, is the appropriate body to address such concerns. The legislative bodies are equipped to investigate concerns and propose legislation or propose modifications to existing legislation. It is well known

that in other areas of practice, such as securities and accounting law, the practice of attorneys is being scrutinized, but through a systematic and thorough analysis of the issues and concerns, not through piecemeal and inconsistent judicial activism. *See* Lewis D. Lowenfels et al., *Attorneys as Gatekeepers: SEC Actions Against Lawyers in the Age of Sarbanes-Oxley*, 37 U. Tol. L. Rev. 877 (Summer 2006). Even in areas where governmental agencies have a strong interest in securing their needs, such as attempting to access confidential information from attorneys whose clients are being investigated, agencies understand the chilling effect their interests have on attorney-client relations and work product, and they are working with attorney professional organizations to address the conflicting needs. For example, the American Bar Association's Task Force is actively addressing the pressure placed on attorneys and their clients by government agencies in their effort to safeguard privileges that serve important societal interests. *See Report of the American Bar Association Task Force on the Attorney-Client Privilege*, SL 096 ALI-ABA 101 (Aug. 2005). It would be unprecedented for a federal court, such as the Sixth Circuit in the instant case, to unilaterally proceed in areas which impact on our federalist system and which will undoubtedly have a chilling effect on attorney-client relations.

The Court should grant the Petition for Writ of Certiorari to maintain the integrity of the judicial system against the challenges imposed by the Sixth Circuit's erroneous decision in this case and the resulting harm and confusion the Sixth Circuit's decision will cause.

CONCLUSION

We urge this Court to grant Weltman, Weinberg & Reis Co., LPA's Petition for Writ of Certiorari and by its review, to direct the Sixth Circuit Court of Appeals to correct its erroneous interpretation and application of the absolute witness immunity rule and the overruling of the *Rooker-Feldman* doctrine to prevent what would result in a dramatic and ill-advised increase in federal court litigation by litigants who want a second bite of the apple without restraint and who desire a means by which to modify state regulations through federal judicial activism rather than legislative procedure.

Respectfully submitted,

Yale R. Levy
Counsel of Record for Amicus Curiae
Pope & Levy Co., LPA
903 Eastwind Drive
Westerville, Ohio 43081
(614) 898-5200